

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

LAWRENCE ROBINSON,	)	No. CV-F-02-5418 OWW
	)	(No. CR-F-97-5129 OWW)
	)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION FOR POST-CONVICTION
	)	DISCOVERY AND RENEWED MOTION
	)	FOR POST-CONVICTION
	)	DISCOVERY (Docs. 334 & 365),
UNITED STATES OF AMERICA,	)	DENYING PETITIONER'S MOTION
	)	TO VACATE, SET ASIDE OR
	)	CORRECT SENTENCE PURSUANT TO
Respondent.	)	28 U.S.C. § 2255 (Doc. 326),
	)	AND DIRECTING CLERK OF COURT
	)	TO ENTER JUDGMENT FOR
	)	RESPONDENT

On August 8, 2002, Petitioner Lawrence Robinson timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. 326).<sup>1</sup> Petitioner contends that he suffered

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<sup>1</sup>By Order filed on September 6, 2006, Petitioner's motion was dismissed as untimely (Doc. 351). However, by Order filed on June 12, 2007, Petitioner's motion to vacate the September 6, 2006 Order was granted (Doc. 362).

1 (1) prosecutorial misconduct because the Government solicited  
2 false and misleading testimony before the Grand Jury resulting in  
3 the Indictment and (2) ineffective assistance of counsel during  
4 pre-trial, trial and appellate proceedings because defense  
5 counsel failed to "take appropriate steps necessary in objecting  
6 and filing suppression motions to preserve Petitioner's  
7 constitutional right to challenge federal jurisdiction under the  
8 Hobbs Act."<sup>2</sup> The United States has filed an opposition to  
9 Petitioner's motion (Doc. 328).

10 A. Background.

11 Petitioner was charged by indictment with various crimes  
12 stemming from two robberies. In connection with the first  
13 robbery of a residence on November 21, 1996, Petitioner was  
14 charged with theft of a firearm and aiding and abetting (Count 3,  
15 18 U.S.C. §§ 2 and 924(1) and (2); and carrying a firearm during  
16 a crime of violence (Count 4, 18 U.S.C. § 924(c)(1)). In  
17 connection with the second robbery of an electronics store,  
18 Videotronics, on May 1, 1996, Petitioner was charged with  
19 interference with commerce by robbery and aiding and abetting  
20 (Count 5, 18 U.S.C. §§ 2 and 1951(a)); carrying a firearm during  
21 a crime of violence (Count 6, 18 U.S.C. § 924(c)(1); and death  
22 caused by use of a firearm during a crime of violence and aiding

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23  
24 <sup>2</sup>Petitioner was represented by Victor Chavez until June 18,  
25 1997. Petitioner was represented by Robert Rainwater and Hilary  
26 Chittick until May 30, 1999. Petitioner was represented on appeal  
by Robert Rainwater. Petitioner was represented by Robert  
Rainwater following the Ninth Circuit's reversal and remand for  
resentencing and on the subsequent appeal from resentencing.

1 and abetting (Count 7, 18 U.S.C. §§ 2 and 924(j)(1)).

2 A jury convicted Petitioner on all but one of the charges.  
3 For his role in the residential robbery, Petitioner was convicted  
4 on the theft of a firearm charge, but acquitted on the charge of  
5 carrying a firearm during a crime of violence. Petitioner was  
6 convicted on all counts related to the robbery of the electronics  
7 store, Videotronics.

8 Petitioner was sentenced to life imprisonment plus a term of  
9 420 months. Petitioner timely appealed his conviction and  
10 sentence. The Ninth Circuit reversed Petitioner's convictions of  
11 the counts relating to the residential robbery on the ground of  
12 insufficient evidence, vacated Petitioner's sentence, and  
13 remanded to the District Court for resentencing. On remand,  
14 Petitioner's sentence was reduced to life imprisonment plus a  
15 term of 300 months. Petitioner's sentence was affirmed by the  
16 Ninth Circuit.

17 C. Grounds for Relief.

18 Petitioner's claims of prosecutorial misconduct and  
19 ineffective assistance of counsel are based on his contention  
20 that, because of evidence that Videotronics' business license had  
21 expired on March 31, 1996, the business could not have been  
22 operating in interstate commerce. Petitioner's motion attaches  
23 as Exhibit A a letter dated March 26, 2001 to Petitioner from  
24 Investigator Eldon Lollar:

25 Per your request, I checked with City Hall  
26 for the business of 'Videotronics'.  
Videotronics was located at 930 Fresno

1 Street., it's business license number is  
2 121205. It opened November 15, 1994 and  
3 closed March 31, 1996. Malcolm D. Rosemond  
4 was the sole owner. City Hall closed  
Videotronics on March 31, 1996, because Mr.  
Rosemond had not paid to keep his business  
license.

5 Also attached to Petitioner's motion as Exhibit D is a copy of a  
6 memorandum dated July 16, 1997 from investigator Michael McDaniel  
7 to Robert Rainwater, Hilary Chittick, Marc Ament and Eldon  
8 Lollar, which states:

9 On July 10, 1997, I received a request to  
10 obtain a copy of a business license under the  
11 name of Malcolm Rosemond. [O]n July 14, 1997,  
a copy of the license was obtained from City  
Hall and it is attached to this report.

12 Because Videotronics did not have a City of Fresno business  
13 license at the time of the robbery, Petitioner argues,  
14 Videotronics could not have been a business operating in  
15 interstate commerce at the time of the robbery. Relying of  
16 Exhibits A attached to his motion, Petitioner contends that,  
17 because Videotronics had closed on March 31, 1996, Videotronics  
18 could not have sold any merchandise after March 12, 1996.

19 Petitioner cites no case authority in support of his  
20 contention and independent research reveals none.

21 That Videotronics may have been conducting business  
22 unlawfully because of the absence of the business license does  
23 not negate liability under the Hobbs Act.

24 In *United States v. Hanigan*, 681 F.2d 1127 (9<sup>th</sup> Cir.1982),  
25 cert. denied, 459 U.S. 1203 (1983), the defendant was convicted  
26 of violating the Hobbs Act when he robbed and tortured illegal

1 aliens. In pertinent part the Ninth Circuit ruled:

2 Hanigan's second attack on jurisdiction is  
3 that the victims were not protected by the  
4 Hobbs Act because they had entered the United  
5 States illegally. He urges that the term  
'commerce' as used in the statute does not  
include commerce that Congress has made  
illegal.

6 Hanigan points to nothing in the statute or  
7 legislative history, however, that would  
8 support his argument that 'commerce' must be  
9 'legal' commerce. The statute by its terms  
10 does not limit 'commerce' to the flow of  
11 legally condoned articles. Nor could the  
12 commerce clause itself mean that an activity  
13 to be regulated by Congress must be legally  
14 permissible. It is anomalous to maintain  
15 that Congress could make undocumented entry  
16 into the United States - the movement of  
17 persons - unlawful, while at the same time  
maintaining that the same movement of persons  
is not 'commerce over which the United States  
has jurisdiction' - the phrase which Congress  
used in the Hobbs Act. 18 U.S.C. §  
1951(b)(3). Accordingly, we hold that the  
movement of undocumented alien laborers  
across a national boundary into this country  
is within the constitutional power of  
Congress to regulate, and thus constitutes  
commerce within the reach of the Hobbs Act.

18 *Id.* at 1130-1131.

19 In *United States v. Ambrose*, 740 F.2d 505 (7<sup>th</sup> Cir.1984),  
20 *cert. denied*, 472 U.S. 1017 (1985), the Seventh Circuit, relying  
21 on *Hanigan*, ruled that policemen who extorted sums for protection  
22 of illegal narcotics activity were properly convicted under the  
Hobbs Act:

23 ... The defendants argue that the interstate  
24 commerce affected must be legal. Some legal  
25 interstate commerce was affected by the  
26 defendants' extorting money from the drug  
dealers whom they protected - commerce in  
quinine and other substances that are mixed

1 with heroin and cocaine in preparing them for  
2 sale to the consumer. It is immaterial that  
3 the amount of commerce affected was small,  
4 either absolutely or relatively; \$68 a month  
5 was held large enough in *United States v.*  
6 *Boulahanis*, 677 F.2d 586, 589-90 (7<sup>th</sup>  
7 Cir.1982), and the amount here was a lot  
8 more. The difference between this case and  
9 *Boulahanis*, however, is that here the lawful  
10 commerce was incidental to an unlawful  
11 activity, the sale of illegal narcotics; and  
12 it can be argued that anything that obstructs  
13 that commerce discourages the unlawful  
14 activity and is therefore a good thing.  
15 Moreover, most of the commerce affected by  
16 the defendants' extortionate activity was  
17 itself illegal commerce, in narcotics; and  
18 again it can be argued that to burden an  
19 illegal interstate business is to promote the  
20 ultimate objectives of the Hobbs Act. Yet  
21 *United States v. Hanigan* ... held that the  
22 Hobbs Act does not require that the  
23 interstate commerce affected by a defendant's  
24 extortionate activity be legal.

25 We think this holding is correct, at least in  
26 a case such as the present where the sums  
extorted are for protecting an illegal  
activity. Although the drug dealers paid the  
defendants substantial sums that, considered  
in isolation, increased the dealers' costs of  
doing business, the dealers got in return  
something invaluable to them - police  
protection that enabled them to conduct their  
businesses on a far larger and presumably  
more profitable scale than would have been  
possible if they had lacked such assistance.  
The benefits to the illegal activity exceeded  
the costs, so that on balance the activity  
was promoted rather than retarded. The issue  
is therefore whether the Hobbs Act can  
reasonably be read to punish extortion that  
promotes illegal commerce as well as  
extortion that retards legal commerce.  
Although discouraging the latter type of  
extortion has been said to be the dominant  
purpose of the Act, see, e.g., *Stirone v.*  
*United States*, 361 U.S. 212, 215 ... (1960);  
*United States v. Mattson*, 671 F.2d 1020, 1023  
(7<sup>th</sup> Cir.1982), discouraging the former is a  
complementary objective and one well within

1 the Act's language. Moreover, it would be  
2 unrealistic to suppose that all Congress  
3 cared about in passing the Hobbs Act was  
4 promoting trade among the states; common  
5 sense, with a little support in legislative  
6 history, suggests that interstate commerce  
7 was not merely the object of Congress's  
8 solicitude but also a handle for enabling  
9 federal power to be brought to bear on  
10 criminal activities that, because of their  
11 multistate incidence, the states had  
12 difficulty controlling ... The extortion in  
13 this case is within the scope of intended  
14 prohibition.

15 *Id.* at 511-512. Accord *United States v. Jones*, 30 F.3d 276, 285-  
16 286 (2<sup>nd</sup> Cir.), *cert. denied*, 513 U.S. 1028 (1994).

17 These cases establish that the legality or illegality of the  
18 business is not relevant or material for purposes of the  
19 interstate commerce element of the Hobbs Act. Consequently, the  
20 absence of a valid City of Fresno business license for  
21 Videotronics at the time of the robbery does not negate this  
22 Court's jurisdiction. The alleged failure of the prosecutor to  
23 present evidence to the Grand Jury or at trial that Videotronics'  
24 business license had expired is not prosecutorial misconduct.  
25 The failure of defense counsel to file pre-trial motions or argue  
26 at trial or on appeal that the absence of the City of Fresno  
business license negated the interstate commerce element of the  
Hobbs Act cannot be ineffective assistance of counsel. Such  
motions clearly would have been without legal merit. Failure to  
make a meritless argument does not constitute ineffective  
assistance of counsel. *Boag v. Raines*, 769 F.2d 1341, 1344 (9<sup>th</sup>  
Cir.1985), *cert. denied*, 474 U.S. 1085 (1986).

1       Petitioner's claim that Videotronics sold no merchandise  
2 after March 12, 1996 is unsupported by evidence. The statement  
3 in Exhibit A that "City Hall closed Videotronics on March 31,  
4 1996, because Mr. Rosemond had not paid to keep his business  
5 license" is inadmissible hearsay. Further, this statement is  
6 contradicted by the evidence related to the Grand Jury by FBI  
7 Agent Kominek that he interviewed Robert Peel, an employee of  
8 Videotronics on May 1, 1996 and that Mr. Peele stated that  
9 Videotronics bought parts to repair televisions from a wholesaler  
10 on the East Coast and sold televisions manufactured in Japan.  
11 Detective Stokes testified to the grand jury that he observed a  
12 big screen television manufactured by Hitachi for sale at  
13 Videotronics. At trial, Robert Peel testified that he was  
14 employed as a technician at Videotronics, that Videotronics sold  
15 TV's and VCR's made outside of California, and that Videotronics  
16 folded after Malcolm Rosemond was murdered. Malcolm Rosemond's  
17 brother, Keith Butler, testified at trial that he assembled the  
18 business records of Videotronics and closed the business after  
19 Rosemond's murder. Mr. Butler identified a collection of orders,  
20 invoices and business records from Videotronics that showed the  
21 type of interstate commerce Videotronics was engaged in until its  
22 closure in May, 1996.

23       Subsequent to the filing of the Section 2255 motion,  
24 Petitioner filed a motion for post-conviction discovery pursuant  
25 to Rule 6, Rules Governing Section 2255 Proceedings for the  
26 United States District Courts. Rule 6(a) provides in pertinent



1 part:

2 A judge may, for good cause, authorize a  
3 party to conduct discovery under the Federal  
4 Rules of Criminal Procedure or Civil  
Procedure, or in accordance with the  
practices and principles of law.

5 "To show 'good cause,' a movant must present specific allegations  
6 which give reason to believe that the movant may, if the facts  
7 are fully developed, be able to demonstrate that he is entitled  
8 to relief." *United States v. Atkin*, 80 F.Supp.2d 779, 787  
9 (N.D.Ohio 2000); *see also United States v. Bontkowski*, 262  
10 F.Supp.2d 915, 920 (N.D.Ill.2003).

11 Attached to Petitioner's motion is a copy of an Information  
12 filed in the Fresno County Superior Court against Malcolm  
13 Rosemond, charging him with selling and furnishing cocaine base  
14 on August 30, 1995 in violation of California Health and Safety  
15 Code § 11352. Also attached to Petitioner's motion is a copy of  
16 a state search warrant for Videotronics issued on August 25,  
17 1995. The affidavit in support of the state search warrant avers  
18 that a confidential informant purchased \$50.00 worth of rock  
19 cocaine from David Hill in a "tire shop warehouse" located in the  
20 same building as Videotronics, the office area of which appeared  
21 to the CI to be common to both the tire shop warehouse and  
22 Videotronics. The Affidavit to the state search warrant further  
23 avers in pertinent part:

24 I am also aware that persons purchasing drugs  
25 may exchange resalable video and audio  
26 equipment for drugs. It has come to my  
attention that a second hand resale business  
permit has been issued by the City of Fresno

1 for the business located at 930 Fresno St.  
2 [Videotronics]. This is functionally the  
3 same permit need to conduct a 'pawn broker'  
4 business from this location. Given the  
5 nature of the Videotronics business, the  
6 presence of electronic equipment in the  
7 garage area and the issuance of the resale  
8 license by the City of Fresno, I request that  
9 the search be included to encompass all  
10 video, audio and other electronic items  
11 located at the business to determine whether  
12 the items are stolen and/or in the rightful  
13 possession of the business, and to seize any  
14 of the above mentioned items that can  
15 reasonably be determined to be involved in  
16 illegal drug transactions or are not in  
17 compliance with the legal conditions or  
18 restriction concerning the resale license.

19  
20 Petitioner contends that Videotronics "was basically a crack  
21 house and not a business, but a front." Petitioner requests that  
22 the Court grant post-conviction discovery "and compel the  
23 government to release all documents pertaining to the arrest of  
24 Malcolm Rosemond and execution of the Search Warrant at 930  
25 Fresno St. (Videotronics)." Petitioner further requests:

26  
27 Upon obtainment of these documents, it is  
28 respectfully requested that the court grant  
29 leave to supplement the record in  
30 relationship to the issues presented, or any  
31 other matters that may be deemed relevant to  
32 these proceedings as a result of reviewing  
33 these documents. It is further requested  
34 that the court stay any further proceedings  
35 pending ruling on this post-conviction  
36 discovery motion and review of said  
37 documents.

38  
39 In his re-newed motion for post-conviction discovery filed on  
40 October 12, 2007, Petitioner contends:

41  
42 [He] submits that he should be allowed Post-  
43 Conviction Discovery ... where it was his  
44 contention at trial [sic] and on habeas that  
45 the Videotronics store was not a place of

1 business, but a crack house, that the items  
2 seized in the execution of the warrant would  
3 prove that Videotronics was not operating in  
4 interstate commerce. The seized purchasing  
5 and ordering receipts will show that the  
6 closure of videotronics [sic] did not affect  
7 interstate commerce because the store did not  
8 actually sell or repair electronic equipment  
9 because the Videotronics was a crack house.  
10 Moreover, the notes from the taped phone  
11 conversations between the officers and the  
12 alleged employees will show that all the  
calls were for crack, not television parts or  
repairs. The taped conversations would also  
prove that the government's witnesses, Robert  
and Calvin Peele testified falsely that the  
[sic] were technicians who worked at the  
store selling electronic equipment or  
repairing TV's, because the tapes would show  
that the [sic] were crack dealers who perhaps  
had made sales of controlled sales of drugs  
to people at the 930 address.

13 Petitioner's motion for post-conviction discovery is DENIED.  
14 For the reasons discussed above, that Videotronics may have been  
15 conducting an illegal business as well as a legal business does  
16 not negate the interstate commerce element of the Hobbs Act.  
17 Furthermore, the state search warrant concerned an alleged  
18 narcotics transaction almost a year prior to the robbery and  
19 murder of which Petitioner stands convicted.

20 CONCLUSION

21 For the reasons stated above:

22 1. Petitioner's motion to vacate, set aside or correct  
23 sentence pursuant to 28 U.S.C. § 2255 is DENIED;

24 2. Petitioner's motion and re-newed motion for post-  
25 conviction discovery is DENIED;

26 3. The Clerk of the Court is directed to enter judgment for

1 **Respondent .**

2 IT IS SO ORDERED.

3 **Dated: October 22, 2007**

**/s/ Oliver W. Wanger**  
UNITED STATES DISTRICT JUDGE